FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 8 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 177.....

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CLYDE W. KRENGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN VANCE HEWITT,
Attorney for Petitioner,
39 Broadway,
New York 6, N. Y.

INDEX

	PAGE
Petition	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Specification of Errors To Be Urged	6
Reasons for Granting the Writ	7
Brief	15
Argument	16
I. The conflict in the decisions whether the Federal Employers' Liability Act renders void per se an employee's contract, made for a valuable consideration after the cause of action had arisen, to bring any action in the designated mutually convenient state or federal forum and not elsewhere, should be resolved by this Court	16
II. The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court	18
III. The failure of the Court of Appeals to reverse and remand the case to the District Court to try any facts affecting the enforceability of the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision	21
Conclusion	25
Appendix	26

Table of Authorities

Cases: PAGE

Akerly v. New York Cent. R. Co., 168 F. 2d 812 (C. C. A. 6th) 9, 14

Brearton v. DeWitt, 252 N. Y. 495 23

Callen v. Pennsylvania R. Co., 332 U. S. 625 ..... 11, 14, 19

Clark v. Lowden, 48 F. Supp. 261 (D. C., D. Minn.) .. 10

Collett, *Ex parte*, —— U. S. ——, 69 Sup. Ct. 944 21

Detwiler v. Chicago, R. I. & P. Ry. Co., et al., 15 F. Supp. 541 (D. C., D. Minn.) 10

Detwiler v. Lowden, 198 Minn. 185 9

Dioguardi v. Durning, 139 F. 2d 774 (C. C. A. 2d) .. 23

Duncan v. Thompson, 315 U. S. 1 21

Fleming, et al. v. Husted, 68 F. Supp. 900 (D. C., S. D. Ia.) 10

Fountain v. Filson, 336 U. S. 681 ..... 13, 14, 24

Grand Trunk Western R. Co. v. Boyd, 321 Mich. 693, *cert. granted* —— U. S. ——, 69 Sup. Ct. 1166 ..... 2, 8, 9, 13, 17

Herrington v. Thompson, 61 F. Supp. 903 (D. C., W. D. Mo.) 10

Kilpatrick v. Texas and Pacific Railway Co., —— U. S. ——, 69 Sup. Ct. 953 21

Miles v. Illinois Central R. Co., 315 U. S. 698 ..... 19, 20

Petersen v. Ogden Union Railway & Depot Company, 110 Utah 573 9

Peterson v. N. Y. Central R. Co. (D. C., N. D. Ill.) (Unreported, see 62 F. Supp. 593) 10

PAGE

Roland v. Atchison, T. & S. F. Ry. Co., 65 F. Supp. 630 (D. C., N. D. Ill.) 10

Sherman v. Pere Marquette Ry. Company, 62 F. Supp. 590 (D. C., N. D. Ill.) 10

Statutes:

Title 28 U. S. C. § 1254 2

Title 45 U. S. C. §§ 51-60 ..... 2, 3

Title 45 U. S. C. § 51 ..... 3, 26

Title 45 U. S. C. § 55 ..... 3, 26

Title 45 U. S. C. § 56 ..... 3, 26

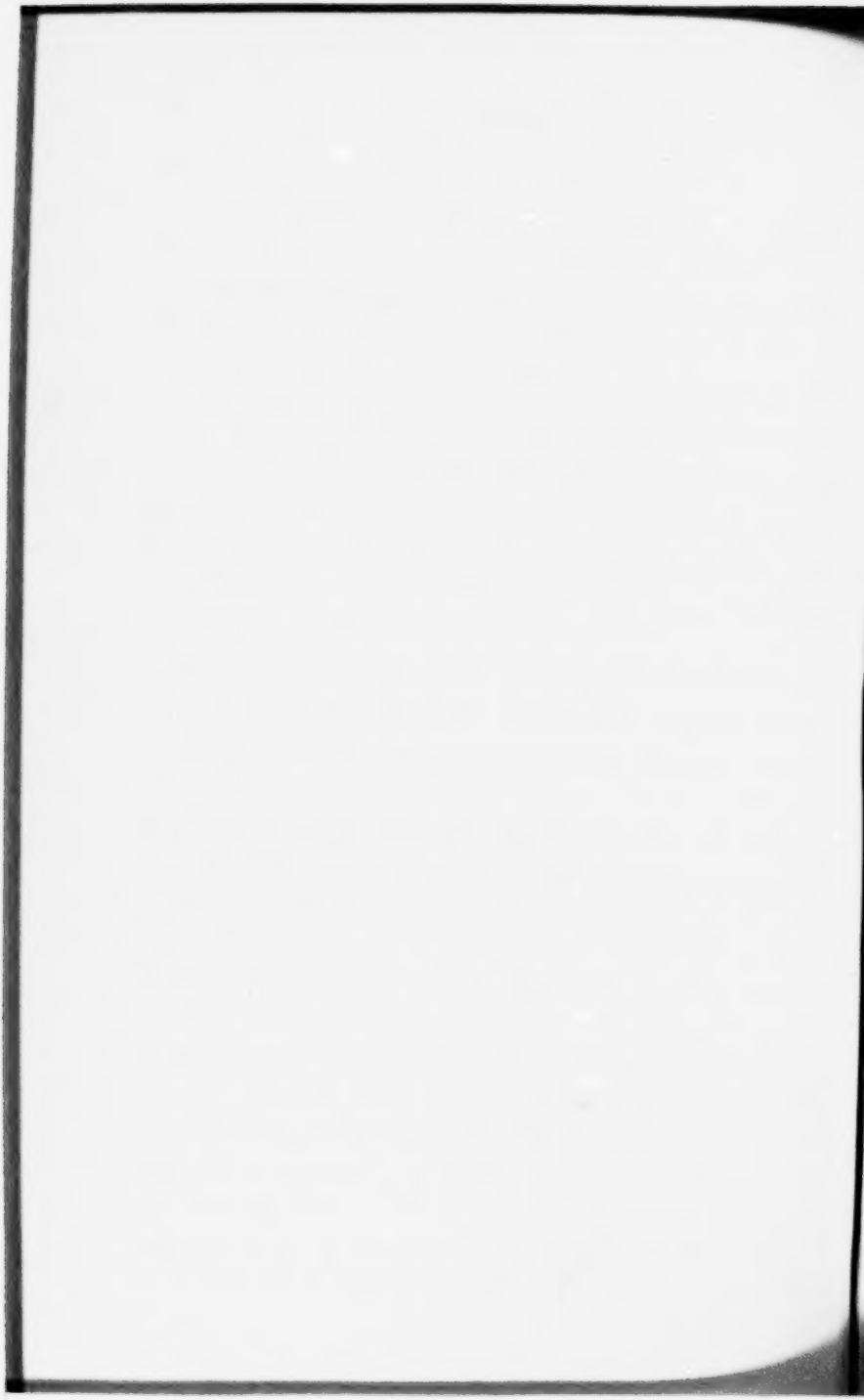
Miscellaneous:

Borah, Senator, Remarks by, 45 Cong. Rec. 4034 18

Devitt, Venue of Actions, 34 Amer. Bar. Ass'n Journal 454 21

H. Rep. No. 613, 80th Cong., 1st Sess. 20

Restatement of the Law of Contracts, Section 558 20



IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CLYDE W. KRENGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Pennsylvania Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on April 14, 1949 (R. 431).

Opinions Below

The opinion and the concurring and dissenting opinions of the United States Court of Appeals for the Second Circuit have not yet been officially reported, but appear in the record on pages 421-430. The opinion of the United States

Court of Appeals for the Second Circuit denying the petition for rehearing has likewise not been officially reported, but appears in the record on pages 455-457. The opinion of the United States District Court on respondent's motion to strike paragraphs IV to VIII of the answer is reported in 8 F. R. D. 65, and appears in the record on pages 25-27.

Jurisdiction

The judgment of the United States Court of Appeals was entered on April 14, 1949 (R. 431) and a petition for rehearing was denied with an opinion on May 25, 1949 (R. 455-457). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28 United States Code, Section 1254.

Questions Presented

The principal questions raised by the holding of the Court of Appeals are as follows:

1. Is a contract, by which a railroad employee agrees that he will not start or prosecute a suit against his common carrier employer, to recover damages for an injury which he has theretofore sustained while engaged in interstate commerce, in any court except one of those sitting within the state where his injuries were sustained or within the state where he resided at the time of the accident, provided that service can be obtained upon the carrier in such state, rendered void by the provisions of the Federal Employers' Liability Act, 45 U. S. C. 51-60; 35 Stat. 65, Secs. 1-10* (hereinafter sometimes referred to as "the Act")?

---

* See *Grand Trunk Western R. Co.* v. *Boyd*, 321 Mich. 693, *cert. granted* ..... U. S. ....., 69 Sup. Ct. 1166.

2. Where in cases under the Act a common carrier pleads such a contract with an injured employee, is the burden of proof upon the carrier to prove that the employee was fully advised of the effect of the contract upon his rights?

3. Where a District Court, before the impaneling of a jury and before the trial of any issue of fact, had granted a motion striking from the answer a defense predicated upon such a contract on the ground that such a contract was as a matter of law rendered void by Section 5 of the Act, but where two of the three judges of the United States Court of Appeals held that the contract was not so rendered void by the Act, was it correct for the said Court of Appeals nevertheless to affirm upon a holding that the contract was unenforceable because the carrier had not proved the facts showing that the employee was fully advised of its effect upon his rights?

Statute Involved

The statute here involved is the Federal Employers' Liability Act, 35 Stat. 65, Secs. 1-10, as amended (45 U. S. C. 51-60). The applicable sections are Sections 1, 5 and 6 (45 U. S. C. 51, 55, 56); and the pertinent provisions thereof are set forth in the Appendix (*infra*, pp. 26-27).

Statement

Two months after respondent, a resident of the State of Ohio, sustained personal injuries there, while employed as yard conductor by petitioner, a corporation of the Commonwealth of Pennsylvania, the parties entered into the agreement, the validity and enforceability of which are here involved. The respondent was paid by the petitioner the sum of $250 and in consideration thereof

agreed as follows (R. 6-7; 413):

> "I will not start or prosecute suit against said The Pennsylvania Railroad Company, to recover damages for my injuries in any court except one of those sitting within the State where my injuries were sustained or within the State where I resided at the time my injuries were sustained, provided service can be obtained on said The Pennsylvania Railroad Company in either of said States."

The contract also provided that the sum so paid and such additional sums as might be advanced were to be retained by respondent, but if any action should be brought they were to be deducted from or credited on any amount finally allowed in settlement or by judgment. Thereafter, from time to time additional advances under similar agreements were made until they aggregated $1,750 (R. 20). It is conceded that petitioner and respondent were engaged in interstate commerce (R. 22, 23).

Subsequently, respondent caused the summons and complaint to be served upon petitioner in New York and instituted this action in the United States District Court for the Eastern District of New York, and not as he had agreed in a state or federal court sitting within the State of Ohio where the accident occurred and where he continued to reside (R. 4, 6, 7). The action was brought under the provisions of the Federal Employers' Liability Act, 35 Stat. 65, Secs. 1-9, as amended, Title 45 U. S. C., Secs. 51-59 (R. 4).

In its answer, petitioner denied liability and in paragraphs IV to VIII thereof alleged the foregoing agreement, the consideration therefor, the fact that respondent resided and continued to reside in the State of Ohio, that the accident occurred at the South Akron, Ohio, yard operated by petitioner, and that petitioner could be served with process in that state (R. 6-7).

In his reply (R. 20), respondent did not deny making the covenant but alleged that the aggregate consideration was to be $2,000 payable in equal monthly instalments of $250 each, that petitioner had refused to pay the last instalment, and that the agreement was made under circumstances such that the execution thereof was not respondent's voluntary act.

Before a jury had been impaneled, respondent moved, in the words of the court (R. 24, 26), "to strike the separate defense alleged in paragraphs IV to VIII, inclusive, of the defendant's answer on the grounds that the agreement hereinabove referred to is void and in contravention of the rights of the plaintiff under Sections 55 and 56 of the Federal Employers' Liability Act, and that the said separate defense is therefore insufficient in law."

The court, by Hon. Leo F. Rayfiel, U. S. D. J., after summarizing the facts and the argument in an opinion (R. 25-27, reported at 8 F. R. D. 65), decided that

> "The right to prosecute this action in this district is an important and valuable right, the denial of which would contravene both the letter and the spirit of Section 55. It appears to me that recourse may be had to legislation alone for the correction of such inconveniences and hardships as the statute may entail.
>
> "The motion of the plaintiff is therefore granted."

An order was entered embodying said decision (R. 415), before the jury was impaneled to hear disputed questions of fact (R. 28). After a trial and verdict by the jury, judgment was rendered for respondent for $28,750 on March 2, 1948 (R. 416). On March 27, 1948, petitioner appealed from the said order and the said judgment (R. 417).

On April 14, 1949, the Court of Appeals affirmed the judgment of the District Court, Judge Swan dissenting. Judge Clark, who wrote for affirmance, held that the agreement was void under the provisions of Section 5 of the Federal Employers' Liability Act (R. 421-427). Judge Learned Hand and Judge Swan ruled that Section 5 of the Act did not bar such contracts (R. 427-428, 430). However, Judge Hand, in a concurring opinion for affirmance, held that such a contract is unenforceable unless the railroad shows that the employee was fully advised of its effect upon his rights and that "in the case at bar the road proved nothing on the subject" (R. 430).* Judge Swan was of the opinion that such a contract, like any other, may be impeached for fraud or mutual mistake, but, unless so impeached, should be respected (R. 430). A petition for rehearing (R. 432-437) was denied by the Court of Appeals on May 25, 1949 (R. 456-457) with an opinion by Judge Hand (R. 455-456).

Specification Of Errors To Be Urged

The Court of Appeals for the Second Circuit erred:

(1) In refusing to reverse the order and judgment of the District Court which held that the contract, limiting the venue to a court sitting in the state where the respondent resided and the accident occurred, was in contravention of the provisions of the Federal Employers' Liability Act and void.

(2) In placing upon petitioner the burden of showing that, at the time the contract was made, the respondent had been fully advised of its effect upon his rights.

---

* It will be subsequently shown (pp. 12-13, *infra*) that the proceedings had not yet progressed to the stage where such proof could be offered in due course.

(3) In holding that the allegations concerning the contract in paragraphs IV to VIII of the answer were, upon motion, properly stricken from that pleading, before the impaneling of the jury, because petitioner had not proved that, at the time the contract was made, the respondent had been fully advised of its effect upon his rights.

(4) In refusing to reverse and remand the case to the District Court to try the issues of fact affecting the enforceability of the contract.

Reasons for Granting the Writ

I.

The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court.

Question 1 (*supra,* p. 2), whether a contract, by which an employee agrees to institute his action under the Federal Employers' Liability Act only in a state or federal court sitting in the state where he resides or where the accident occurred, is rendered void by the provisions of the Federal Employers' Liability Act, and Question 2 (*supra,* p. 3) whether, if such a contract is not so rendered void by the Act, it is nevertheless unenforceable unless the employer has sustained the burden of showing that when making the contract the employee had been fully advised of its effect upon his rights, are important questions of federal law which have not been but which should be settled by this Court.

Judge Clark followed the District Judge and answered Question 1 in the affirmative (R. 421-427); Judges Learned Hand and Swan answered Question 1 in the negative (R. 427-428, 430). Judge Hand answered Question 2 in the

affirmative (R. 430), while Judge Swan answered it in the negative (R. 430).

In his concurring opinion Judge Hand said (R. 427):

> "There has been a spate of decisions as to whether, after he has been injured, an employee may make a valid contract which limits the choice of forums allowed him by § 6. Some of these have held such contracts valid; some have held them invalid under § 5; * * * obviously, the situation is one where only the Supreme Court can speak with finality."

Judge Swan, in his dissenting opinion, said (R. 430):

> "I should prefer to withhold decision to await action by the Supreme Court in *Grand Trunk Western R. Co.* v. *Boyd,* 321 Mich. 693, petition for certiorari pending."

This Court, on June 7, 1949, granted the petition for a writ of certiorari in *Grand Trunk Western R. Co.* v. *Boyd,* 321 Mich. 693, ... U. S. ...., 69 Sup. Ct. 1166, in which the question presented was:

> "Were the contracts entered into between Petitioner and Respondent in the circumstances of this case void under Section 5 of the Federal Employers' Liability Act, for the reason that their effect was to enable Respondent to exempt itself from a liability created by Section 6 of the Act."

While the question presented in the *Boyd* case is substantially similar to our Question 1 (*supra,* p. 2) it does not comprehend our Question 2 or the principle enunciated in the concurring opinion. Judge Hand, after holding that Section 5 does not bar such contracts, stated his reason for joining in the affirmance (R. 430):

> "I would hold such contracts unenforceable unless the road shows that the employee was fully advised of

their effect upon his rights. I need not say what advice is necessary for in the case at bar the road proved nothing on the subject".

It is important that these questions be settled by this Court.

II.

There is a sharp conflict in judicial opinion with respect to the validity of such contracts which ought to be resolved by this Court.

We have seen that two of the three judges of the United States Court of Appeals for the Second Circuit deciding the instant case have held that such a contract was not violative of Section 5 of the Act (*supra*, p. 6).

In the other case decided by a Circuit Court of Appeals, *Akerly* v. *New York Cent. R. Co.*, 168 F. 2d 812 (C. C. A. 6th), two of the three judges held the contract was in contravention of Section 5.

The highest courts of the states have divided as follows:

The Supreme Court of Michigan and the Supreme Court of Minnesota have held such agreements valid.

Grand Trunk Western R. Co. v. *Boyd*, 321 Mich. 693, *cert. granted* ..... U. S. ....., 69 Sup. Ct. 1166;
Detwiler v. *Lowden*, 198 Minn. 185.

On the other hand, three of the five judges of the Supreme Court of Utah held invalid a contract under the Act, construed to limit the venue to a single federal district court, excluding the state court. *Petersen* v. *Ogden Union Railway & Depot Company*, 110 Utah 573.

The federal district courts are likewise not in agreement. Such contracts have been sustained in the following decisions:

Roland v. *Atchison, T. & S. F. Ry. Co.*, 65 F. Supp. 630 (D. C., N. D. Ill.);
Herrington v. *Thompson*, 61 F. Supp. 903 (D. C., W. D. Mo.);
Clark v. *Lowden*, 48 F. Supp. 261 (D. C., D. Minn.);
Detwiler v. *Chicago, R. I. & P. Ry. Co., et al.*, 15 F. Supp. 541 (D. C., D. Minn.);
Peterson v. *N. Y. Central R. Co.* (D. C., N. D. Ill.), an unreported decision (see 62 F. Supp. at p. 593).

The decisions in the following cases have held such contracts prohibited by Section 5 of the Act:

Sherman v. *Pere Marquette Ry. Company*, 62 F. Supp. 590 (D. C., N. D. Ill.);
Fleming, et al. v. *Husted*, 68 F. Supp. 900 (D. C., S. D. Ia.).

It is important that this diversity of opinion be resolved by this Court.

III.

The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court.

In his dissenting opinion, Judge Swan said (R. 430):

"Since a release of plaintiff's right to damages is valid unless impeached, *Callen* v. *Pennsylvania R. Co.*,

> 332 U. S. 625, 630, *a fortiori* a release of a mere venue privilege should be good, absent any charge of fraud or mistake in obtaining it."

In the *Callen* case the plaintiff had contended that a release in settlement of a cause of action violated Section 5 of the Act, which provides that a contract or device to enable a common carrier to "exempt itself from any liability created by this Act shall to that extent be void." However, this Court held (pp. 630-631) that it was obvious that such a release was not a device to exempt from liability but a means of compromising a claimed liability and that where controversies with respect to the existence or amount of liability exist, Congress has not said that the parties may not settle their claims without litigation. It would seem to follow that an agreement, by which plaintiff chooses a forum in which to try his cause of action, is not a device to exempt a carrier from liability but a means of selecting a place for an adjudication of that liability. Similarly where controversies exist, Congress has not said that the parties may not agree upon the forum in which the claim is to be determined and enforced. It is submitted, therefore, that as indicated in the dissenting opinion (R. 430) Judge Clark's holding that the venue contract was prohibited by Section 5 of the Act is in probable conflict with this Court's decision in the *Callen* case.

Furthermore, Judge Hand's decision (R. 430), that the carrier has the burden of showing that the employee was fully advised of the effect of the contract upon his rights, is likewise in probable conflict with the decision of this Court in the *Callen* case wherein it was said (332 U. S. 625, 630):

> "However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank

recognition that the Congress has made no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. * * * But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by mutual mistake under which both parties acted."

If the burden of justifying a settlement for $250 of the entire cause of action which a jury subsequently valued at $24,990 is not on the carrier, it would seem to follow that it has no such burden in order to sustain a contract providing for the cause to be tried in the employee's home state where the accident occurred and the witnesses are to be found.*

In both respects, the decision of the Court of Appeals is probably in conflict with the applicable decision of this Court.

IV.

When a majority of the judges of the Court of Appeals disagreed with the decision of the District Court that the contract as a matter of law was in contravention of Section 5 of the Act, their failure to reverse and remand the case to the District Court to try any facts affecting the enforceability of the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision.

Irrespective of where the burden of proof lay (III, *supra*, pp. 10-12), the action had not progressed to a

---

* Other portions of the decisions of the Court of Appeals probably in conflict with this Court's decisions will be shown on p. 13, *infra*.

proper stage for the introduction of evidence as to any disputed facts.

When the District Court, before a jury had been impaneled, decided that the contract was illegal *per se* because prohibited by the Act (R. 25-27) and entered its order (R. 415-416) striking from the answer paragraphs IV to VIII, all issues concerning the contract as prohibiting a trial in New York were excised from the case. If the District Court had sustained the validity of the agreement against the attack that it was void under the Act, then the orderly procedure would have been for the parties, after impaneling the jury, to offer evidence bearing upon the issues of fairness, fraud and other circumstances with respect to its enforceability.

But the concurring opinion would require the petitioner, at that time, to prove the facts concerning the advice to the employee (R. 430), although the District Court was deciding the motion to strike as a matter of law upon undisputed facts. Such a course, as will be more fully shown in the annexed brief (pp. 21-25, *infra*), would have required the District Court to subvert normal procedure and to withhold deciding what was in effect a demurrer until disputed facts had been tried to the jury. The decision, as embodied in the concurring opinion, which was essential to affirmance, is also in probable conflict with the applicable decision of this court in *Fountain* v. *Filson*, 336 U. S. 681.

Conclusion

In refusing to reverse the decision of the court below which had stricken from the answer the allegations concerning the employee's contract as violative of Section 5 of the Act, the Court of Appeals decided an important question of federal law which has not been, but should be, resolved by this Court. Cf. *Grand Trunk Western R. Co.*

v. *Boyd*, 321 Mich. 693, *cert. granted* ..... U. S. ....., 69 Sup. Ct. 1166. Furthermore, there is a sharp divergence of judicial opinion in the various state and federal courts with respect to the validity of such contracts. As to the applicable principles of law, the Court of Appeals for the Second Circuit differed with the decision of the Court of Appeals for the Sixth Circuit in *Akerly* v. *New York Cent. R. Co.*, 168 F. 2d 812. In respect to both the validity of the contract and the burden of proof, the decision of the Court of Appeals is probably in conflict with the decision of this Court in *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625. The concurring opinion, which was essential to the affirmance, is also probably in conflict with the decision of this Court in *Fountain* v. *Filson*, 336 U. S. 681.

For the reasons heretofore stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THE PENNSYLVANIA RAILROAD COMPANY,
By JOHN VANCE HEWITT,
Attorney for Petitioner,
39 Broadway,
New York 6, N. Y.

New York, N. Y., July 6, 1949.

In the

Supreme Court of the United States

October Term, 1949

No. .....

The Pennsylvania Railroad Company,

Petitioner,

against

Clyde W. Krenger,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinions below, the statement as to jurisdiction, the statement of the case and the specification of errors to be urged are set forth in the petition at pages 1, 2, 3 and 6, respectively, and are not repeated here.

ARGUMENT

I.

The conflict in the decisions whether the Federal Employers' Liability Act renders void per se an employee's contract, made for a valuable consideration after the cause of action had arisen, to bring any action in the designated mutually convenient state or federal forum and not elsewhere, should be resolved by this Court.

On the question of the validity under the Act of agreements such as the contract at bar, there is a sharp divergence of judicial opinion as has been shown in the petition (*supra,* pp. 9-10). The argument in the cases holding such contracts void was adopted by Judge Clark and may be found in his opinion (R. 421-427). It is respectfully submitted that the reasoning of the courts sustaining such contracts is the more persuasive.

The type of contract rendered void by Section 5 of the Act (45 U. S. C. Sec. 55, 35 Stat. 65, Sec. 5, see Appendix) is one, the purpose or intent of which is to enable a common carrier to exempt itself from any liability created by the Act. The only liability created by the Act is found in Sections 1 and 2 (45 U. S. C. Secs. 51 and 52), wherein it is provided that every common carrier by railroad, while engaging in commerce as therein defined, shall be liable in damages to an employee for injury or death suffered while so employed and resulting from the faults of the carrier therein specified. Liability for damages is the sole liability created by the Act. There is no other. Sec. 51 is entitled "Liability of common carriers by railroad in interstate or foreign commerce, for injuries to employees from negligence; definition of em-

ployees." The "liability created by this Act," which Sec. 5 protects is the liability created by Sec. 1; and the type of contract rendered void by Sec. 5 is a contract the purpose and intent of which is to enable a common carrier to exempt itself from such liability. Since there is no finding that the purpose, intent or even tendency of the plaintiff's agreement was to enable the carrier to exempt itself from any liability created by the Act, that is, from any liability to pay damages for the injuries, the agreement is not, as the District Court and Judge Clark thought, rendered void by the provisions of Section 5.

The Supreme Court of Michigan, in *Grand Trunk Western Railroad Company* v. *Boyd,* 321 Mich. 693, *cert. granted* ..... U. S. ..... , 69 Sup. Ct. 1166, did not lose sight of the fact that the real question was one of Congressional intent, saying, at 321 Mich. 699:

> "If Congress by using the word liability in Section 55 had intended to include venue, such intent could have been readily and clearly expressed. It is to be noted that Congress did not say 'exempt itself from any of the provisions of this chapter', but Congress says only 'from any liability created by this chapter.'
>
> "Section 51 of the chapter (hereinbefore quoted) declares the matters for which the employer is 'liable' and that liability is for injuries sustained by an employee. That liability in its various forms is plainly the liability contemplated in Section 55 in question."

This is also recognized in both the concurring and dissenting opinions in the case at bar (R. 427-428, 430).

The determination of venue within the limitations of Section 6 of the Act rests with the employee. If he should select a venue by bringing an action, it would not be suggested that he had in any way exempted the carrier from liability. When he voluntarily selects the locality of

the law suit he exercises the privilege which the Act confers. Ultimately he must do so. There is no basic difference between the employee's selection of his own state as the forum to enforce the claimed liability of the carrier by conducting a law suit therein and his selection of venue in such jurisdiction by way of a contract based upon a sufficient consideration. Many reasons might be suggested why the jurisdiction selected would be the most convenient and least onerous. That is particularly true where, as here, he has selected the state where he resides and where the witnesses to the accident are to be found. It is not even suggested that the respondent would not receive a fair and equitable trial in the federal or state courts sitting in Ohio, or that a jury chosen from his own locality after listening to their fellow townsmen as witnesses would not have reached a just verdict.

The purpose of the amendment adding the venue provisions to Section 6 was succinctly presented to the Senate by Senator Borah of the Committee on the Judiciary when he stated, as the objection to the then existing law, that a plaintiff might sometimes be compelled to travel a great distance to have his cause of action against the defendant because the action, in certain instances, would have to be brought in the district whereof the defendant was an inhabitant. The amendment, he said, would remedy that objection (45 Cong. Rec. 4034).

The instant contract is not in conflict with that purpose.

II.

The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court.

It has been heretofore shown in the petition (*supra*, pp. 10-12) that, in affirming upon the opinion (R. 421-427) and concurring opinion (R. 427-430), the Court of Appeals

has decided federal questions in a way probably in conflict with the applicable decision of this Court, *Callen* v. *Pennsylvania Railroad Company*, 332 U. S. 625, 630, as indicated in the dissenting opinion of Judge Swan (*supra*, p. 10; R. 430).

We are not unmindful of the distinction attempted in the concurring opinion (R. 429) that the burden of proof was on the carrier only with respect to the contract fixing the venue and not with respect to a contract of release and settlement. As to the former, Judge Hand held that the railroad must show that the employee had received "the advice of someone who adequately informed him of the effect of the contract upon his rights" (R. 456) "someone not in the defendant's employ", "a lawyer", although that qualification was not to be an "inflexible condition" (R. 456).

The reason given for the distinction was "Moreover, he [employee] is at a much greater disadvantage in estimating the effect of the contract upon his rights, than when he settles the claim. He is likely to suppose that one court is like another; and certainly he cannot be deemed to be acquainted with those differences between them which may in fact vitally affect his recovery" (R. 429). Perhaps, after considering an adequate survey of the problem, a jury might so find. However, with a total absence from the record of any such factual basis, the inference would seem to be to the contrary. When determining the venue by contract, he is surrendering only the opportunity for further "shopping for a judge or a jury"*, while in making a final settlement he is not only foregoing that opportunity but he is placing a value on his entire cause of action, for unlike the payment for a venue contract, beyond the consideration for a final settlement, he gets

---

* Concurring opinion of Mr. Justice Jackson in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 706.

nothing. If the carrier need not sustain the burden of proof with respect to the employee's information when executing a release, the carrier should not be called upon to bear such a burden in order to sustain a venue contract.

When called upon to answer the petition for rehearing (R. 438) the respondent did not attempt to justify either the distinction or the conclusion in the concurring opinion (R. 440-450), but on the contrary sought to sustain the affirmance upon the doctrine that the venue contract was invalid under the Act (R. 440-441) or was barred by public policy (R. 442-447).

That such an agreement is not invalid under the Act has been shown (*supra*, pp. 16-18). Nor is it contrary to public policy. The distinction between such a contract and the agreements sometimes said to be against public policy is that in the instant case the contract pertains to a specific existing cause of action while the agreements sometimes condemned purport to control all causes of action which may arise in the future under any circumstances and conditions. The Restatement of the Law of Contracts, Section 558, provides the double test, condemning a contract which limits "unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action." The contract at bar meets both tests. It does not concern "a possible future right of action" nor does it "limit unreasonably" the venue of this action. It does not drag the employee across the country to a foreign jurisdiction but designates certain courts convenient for the parties and the witnesses to the accident. There is nothing *per se* unreasonable about litigating an Ohio law suit in Ohio. Instead of violating public policy a contract of the type at bar tends to avoid certain abuses of the venue provision of Section 6 which have been recognized by judges and by legislators. See concurring opinion in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 at pages 706-707; Report No. 613, House

of Representatives, 80th Congress, 1st Session; Devitt, Venue of Actions, 34 Amer. Bar Ass'n. Journal, pages 454 ff. (June, 1948).

Furthermore, the Act prescribes its own public policy, rendering void not all contracts affecting the provisions of the Act but only those contracts tending to exempt the carrier from any liability created by the Act. Unlike the contract in *Duncan* v. *Thompson,* 315 U. S. 1, the contract at bar did not have the effect of depriving the plaintiff of his right to enforce any liability of the carrier for damages. Such an agreement is not against public policy. It would be strange indeed if the right conferred by Section 6 is so inviolable that the employee is not permitted by law or public policy to part with it for its full value, and yet a court can give it away without consideration and against the owner's desire. *Ex parte Collett,* ..... U. S. ....., 69 Sup. Ct. 944; *Kilpatrick* v. *Texas and Pacific Railway Co.,* ..... U. S. ....., 69 Sup. Ct. 953.

III.

The failure of the Court of Appeals to reverse and remand the case to the District Court to try any facts affecting the enforceability of the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision.

Even if the burden of proof with respect to the advice given to the employee had been upon the carrier (see *supra,* pp. 19-20), the Court of Appeals should have remanded the case to the District Court to try such facts. Its failure to do so was a departure from the customary course of judicial proceedings.

The consideration of this question requires a recital of certain additional factual details not pertaining to the questions heretofore discussed.

The answer, in addition to the denials, contained two defenses addressed to the contract (R. 6-7 and 7-8). The first, reliance upon the contract to prevent suit in New York, was alleged in paragraphs IV to VIII (R. 6-7), subsequently stricken. The second was a partial defense setting forth the provisions in the contract for the deduction of the $1,750 from any judgment. This partial defense was never actually contested in the District Court.

After answer and upon motion, the District Judge directed (R. 19) "that the trial of all of the issues both of fact and of law arising out of paragraphs 'IV' to 'VIII', inclusive of the defendant's answer be tried and determined before the Court and a jury in advance of" the other issues. In his reply, the respondent claimed nonperformance, fraud and that the instrument was executed under circumstances such that the action was not his voluntary act (R. 20-21). With this setting that any facts with respect to paragraphs IV to VIII had been directed to be tried to a jury, the case came on for trial. Before a jury had been impaneled for the trial of such facts, respondent made his motion to strike paragraphs IV to VIII from the answer as in violation of Section 5 of the Act and therefore insufficient as a matter of law (R. 24, 26; p. 5, *supra*). This was a motion addressed to the law upon undisputed facts and in his consideration thereof without objection, the judge accepted the contract as if an exhibit to the pleadings.*

---

* Before concluding his argument in opposition to the motion, the counsel for petitioner said: "I desire to submit herewith the original of that agreement executed by the plaintiff."

"The Court: The agreement is received in evidence" (R. 25). This was done without proof of authenticity and without objection.

If the learned judge had sustained the validity of the contract against the attack that it was void under the Act, then the parties after impaneling the jury would in orderly procedure have offered evidence bearing upon the issues of fact presented by paragraphs IV to VIII of the answer and by the reply thereto. But after the District Court decided that the contract was illegal because prohibited by the Act and entered its order striking the defense, all issues concerning the contract prohibiting the trial in New York had been excised from the case.*

However, Judge Hand held that when the motion was made it was part of defendant's case to prove the facts of the advice to the employee (R. 456). This would have required the petitioner to insist that the District Judge subvert the normal procedure and withhold deciding what was in effect a demurrer to the pleading until he had first tried to the jury the disputed facts relating thereto. For the carrier to have asked and then repeatedly insisted that the District Judge depart from the customary manner of trying a law suit in order to try facts concerning the enforceability of the contract before deciding the question of law as to its validity, would have been, at least, most unusual procedure. Its failure to do so does not merit the destruction of its rights.

In New York a party relying upon a contract is not required to plead that the circumstances under which it was obtained did not render it unenforceable. *Brearton* v. *DeWitt*, 252 N. Y. 495; see also *Dioguardi* v. *Durning*, 139 F. 2d 774 (C. C. A. 2d). We do not understand

---

* Any evidence with respect to the agreement or the payments of $250 or $1,750 (R. 448, 449; 453, 454) was subsequent thereto and related only to the provision that any payment should be credited on the judgment as alleged in the second partial defense, in paragraphs IX and X of the answer (R. 7, 8) the validity of which had not been contested and the provision of which had not been stricken from the answer.

that the concurring opinion holds to the contrary in this respect. Hence evidence of the advice given to the employee by someone not in the carrier's employ (R. 456) could not be readily offered until the court had overruled the demurrer, that is, denied the motion. The decision granting the motion was rendered immediately upon the conclusion of the argument regarding the effect upon the contract of Section 5 of the Act (R. 24-27). The concurring opinion seems to confuse the motion to strike a pleading on its face with a dismissal of the defense after proof. In this respect it is to be remembered that the concurring opinion which was essential to the affirmance went off on a proposition not considered by the District Court nor argued by counsel there or in the Court of Appeals. These matters were called to the attention of the Court of Appeals by a petition for rehearing timely made (R. 433-437).

The decision of the Court of Appeals in this respect is in probable conflict with the applicable decision of this Court called to its attention upon the application for rehearing (R. 454). In *Fountain* v. *Filson,* 336 U. S. 681, the United States Court of Appeals had disagreed with the decision of the District Court and then, upon facts not considered by that court below, had directed the entry of final judgment and thereafter denied a timely motion specifically calling the court's attention thereto. This Court reversed for the reason that "the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" and directed that an opportunity be given to try the "new issue" before the District Court.

Upon disagreeing with the decision of the District Court that the contract as a matter of law was in contravention of Section 5 of the Act, the failure of the Court of Appeals to reverse and remand the case to the District Court to try any questions of fact affecting the enforceability of

the contract was a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

New York, N. Y., July 6, 1949.

Appendix

The relevant provisions of the Federal Employers' Liability Act (35 Stat. 65, Secs. 1-10 as amended; Title 45 U. S. C., Secs. 51-60) are the following:

"§ 51. **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.**

Every common carrier by railroad while engaging in commerce between any of the several States, * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * *, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, * * *" (Sec. 1 of the Act).

"§ 55. **Contract, rule, regulation, or device exempting from liability; set-off.**

Any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *" (Enacted Apr. 22, 1908, as Sec. 5 of original Act).

"§ 56. **Actions; limitation; concurrent jurisdiction of courts; removal of case in State Court.**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of

the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States'' (Second paragraph added to Sec. 6 of the Act by amendment Apr. 5, 1910, 36 Stat. 291).